

# Ordering Divine Knowledge in Late Roman Legal Discourse

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*In the celebrated words of the Severan jurist Ulpian – echoed three hundred years later in the opening passages of Justinian’s Institutes – knowledge of the law entails knowledge of matters both human and divine. This essay explores how relations between the human and divine were structured and ordered in the Imperial codex of Theodosius II (438 CE). Deliberately side stepping vexed categories such as ‘Christian’, ‘pagan’, ‘heresiological’ etc., the essay self-consciously frames the question as one of ‘knowledge-ordering’ in order to develop a broader framework concerning relations between emperors and the divine. How was knowledge about the divine textualised in Book XVI of the Codex Theodosianus and with what implications for a late Roman imperial ‘ordering of knowledge’?*

## Introduction

Knowledge (*prudentia*) of the law entails knowledge (*notitia*) of matters both human and divine, and knowledge (*scientia*) of the just and unjust ...<sup>1</sup>

Recent scholarship on power and knowledge under the Roman Empire has drawn attention to “the wide spread of the knowledge-ordering obsessions” of Greco-Roman (elite) writers during the first to fourth centuries CE.<sup>2</sup> I intend to widen those knowledge-ordering obsessions further by suggesting that the *Codex Theodosianus* (438 CE) should also be understood as a work of Roman Imperial knowledge-

ordering.<sup>3</sup> More particularly, I will argue that the designation and arrangement of the title-rubrics within Book XVI of the Codex Theodosianus was intended to showcase a new, imperial and Theodosian, ordering of knowledge concerning matters human and divine.

König and Whitmarsh’s 2007 edited volume, *Ordering Knowledge in the Roman Empire* is concerned primarily with the first three centuries of the Roman empire and does not include any extended discussion of how knowledge was ordered and structured in Roman juristic or Imperial legal texts.<sup>4</sup> Yet if we classify the *Codex Theodosianus* as a specialist form of Imperial prose literature, rather than classifying it initially as a ‘lawcode’, the text fits neatly within König and Whitmarsh’s description of their project:

Our principal interest is in texts that follow a broadly ‘compilatory’ aesthetic, accumulating information in often enormous bulk, in ways that may look unwieldy or purely functional to modern eyes, but which in the ancient world clearly had a much higher prestige that modern criticism has allowed them. The prevalence of this mode of composition in the Roman world is astonishing... It is sometimes hard to avoid the impression that accumulation of knowledge is the driving force for all of Imperial prose literature.<sup>5</sup>

The fifth-century *Codex Theodosianus* shares in the broad Roman “compilatory aesthetic” identified here by König and Whitmarsh. In its extant form, the *Codex* is made up of excerpts from around 2,700 Imperial constitutions – each entry complete with an attribution to the issuing emperor(s) and a consular date.<sup>6</sup> According to the Emperor Theodosius II’s 429 CE address to the Constantinopolitan Senate, the *codex* was to include *all* the constitutions issued by Constantine and emperors up to and including himself that had the force of edicts or “rest[ed] on the strength of sacred [imperial] generality”.<sup>7</sup> Exploring how the compilers of the *Codex Theodosianus* selected, categorized and structured their raw material literally showcases Roman

<sup>3</sup> Mommsen 1905. As Mommsen’s Prolegomena (volume I.1) lays out, the manuscript support for Books VI–XVI of the *Codex Theodosianus* is relatively good but only about one third of the original content of Books I – V survives. Mommsen reconstructed his version of Books I – V mainly using the early sixth-century compilation known as the *Breviarium* of Alaric (the *Lex Romana Visigothorum*). Krüger 1923, however, also (rightly) includes constitutions from the *Codex Iustinianus* in his reconstructed text.

<sup>4</sup> But see the suggestive comments in the essay by Serafina Cuomo in König and Whitmarsh 2007.

<sup>5</sup> König and Whitmarsh 2007, 3. On the *Codex Theodosianus* [CTh] as a ‘literary’ work see Vessey 2003.

<sup>6</sup> For the total of around 2,700 constitutions see the discussion at Matthews 2000, 75, footnote 49. On the complexities arising from the requirement to record consular dates for each entry in the *Codex* see also Matthews, 2000.

<sup>7</sup> CTh I.1.5 (Mommsen, 1905: 28, lines 2–4). CTh I.1.6, given at Constantinople and dated December 20 435, repeats the same order with the clarification that this is to include all the edictal and general constitutions which have been ordered to be valid or have been posted in definite provinces or districts (Mommsen 1905: 29, lines 1–2). For further discussion see Matthews 2000, 62–7.

<sup>1</sup> Justinian, *Digest* I.1.10.2 (Ulpian, Rules book 1): *luris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia*. See also Justinian, *Institutes* I.1.1. On the lexicological differences between *prudentia*, *notitia* and *scientia* as ‘knowledge’ see MacCormick 2001.

<sup>2</sup> König 2009, 79. Also König and Whitmarsh 2007 and König and Woolf 2013. On knowledge-ordering more generally see Blair 2010 (who mainly focuses on the Renaissance and Early Modern periods).

imperial power at work: “...mapping and colonising the enormous expanse of pre-existing knowledge”.<sup>8</sup>

Having gathered together imperial constitutions from diverse archives across the Empire – both central and provincial – the compilers of the *Codex Theodosianus* relocated (minimally-edited) extracts from those discrete texts into a new physical archive: a single-volume *codex*.<sup>9</sup> With almost 1,600 years of hindsight, the classification of this single-volume *codex* as a lawcode may seem natural and obvious to us today – especially given the present-day prevalence of both formal and substantive legal codifications across national, international and global contexts. Yet in addition to the specific Roman legal precedents explored below in Section 2 (including the Gregorian and Hermogenian codes of the Diocletianic era), the *Codex Theodosianus* also needs to be understood in relation to wider Greco-Roman knowledge-ordering projects. More specifically, the structuring of material within the *Codex Theodosianus* depends upon and demands an ‘archival thinking’, which in turn underpins a highly specific set of relations between knowledge, power and authority:

Archival thinking encourages a specific approach to knowledge, as manipulable, discrete fragments. Like Propp’s structuralism, Lévi-Strauss’ mythography or Barthes’ cultural semiology, the [Greco-Roman] texts analysed in this volume characteristically conceive of their primary operation as the analysis of raw material (whether ‘reality’ or pre-existing text) by a process of itemisation. ‘Knowledge’ is to be conceived of as an aggregate of discrete particles that are to be subjected to a process of analytical ordering.<sup>10</sup>

‘Archival thinking’ is, of course, related to questions concerning the physical materiality of archives: for example, were written records stored with a view to retrieval and future use or merely deposited as ‘heaps of documents’?<sup>11</sup> König and Whitmarsh’s specific use of ‘archival thinking’, however, draws our attention to the kind of mental architecture, the systems of knowledge and power, that underpinned imperial texts. It is this specific sense of ‘archival thinking’ that I am interested in exploring in relation to the *Codex Theodosianus*.

The analytical ordering of the *Codex Theodosianus* comprises sixteen books, with discrete excerpts from imperial constitutions arranged chronologically under thematic rubrics (*tituli*). The overarching structure of books, thematic-titles and

<sup>8</sup> Phrase quoted from König and Whitmarsh 2007, 29. See further the discussion in Section 2 below on the *CTh* project as specifically envisaged in 429 AD.

<sup>9</sup> On the current debate surrounding the archival sources for the *Codex Theodosianus* see the essay by Huck, the ‘Réaction’ by Sirks and the subsequent response by Huck in Crogiez-Pétrequin and Jaillette 2012, 79-127, together with the essay by Sirks (“Where did the Theodosian compilers take their texts from?”) in the same volume, 153-164.

<sup>10</sup> König and Whitmarsh 2007, 35 (defining ‘archival thinking’ using Foucault).

<sup>11</sup> Kelly 1994, 166. On late Roman legal / bureaucratic archives see the works cited in footnote 9 above.

separate (extracted) texts creates a relationship between ‘discrete parts’ and ‘architectonic whole’: a relationship which König and Whitmarsh, referring to earlier Greco-Roman prose and verse texts, describe as simultaneously ‘imperial’ and ‘archival’. Moreover, according to König and Whitmarsh, both modes of thinking – the imperial and archival – share a common rhetoric of ‘unity in diversity’.<sup>12</sup> This rhetoric of ‘unity in diversity’ is clearly evident in Theodosius II’s *Novel* 1, dated February 15, 438; the text that confirmed the Code’s validity and ordered the posting of edicts, so that news of Theodosius’ achievement would “come to the knowledge of all peoples and all provinces”:

Wherefore we have cleared away the cloud of volumes on which many lives have been exhausted explaining nothing; We confirm this abridged knowledge (*scientia*) of the divine imperial constitutions from the time of the Sainted Constantine ... However, their own immortality has not been taken away from any of the previous Emperors, the name of no lawgiver has perished; rather, they [their laws] have been changed by the clarification of Our jurisconsults for the sake of lucidity, and they are joined with us in an august fellowship.<sup>13</sup>

The same rhetoric of ‘unity in diversity’ underpins the *Codex Theodosianus* as a whole, including – as I will argue in Section 3 below – Book XVI, the book ‘... entièrement consacré à la religion’.<sup>14</sup>

The *Codex Theodosianus* is more than an authoritative collection of late Roman imperial constitutions: it effectively constitutes Roman law as an object to be known imperially i.e., through a specific ‘imperial and archival’ cultural logic and epistemology.<sup>15</sup> In a straightforward sense, Book I defines who and what constitutes authoritative legal knowledge, both for the purposes of the 438 CE code’s compilation and more generally with reference to forensic practice.<sup>16</sup> The *Codex Theodosianus* addresses itself to an intended audience of present and future legal practitioners, including litigants, magistrates and other judicial and administrative officials: it was to be valid in all cases and in all courts and was to “leave no place for any new constitution that is outside itself, unless that constitution had been

<sup>12</sup> König and Whitmarsh 2007, 36.

<sup>13</sup> Theodosius II, *Novel* 1.3 (Meyer and Mommsen 1905, 4: lines 18-20 and 23-25. Trans. Pharr et al, revised).

<sup>14</sup> Phrase quoted from Rougé and Delmaire 2005, 53. Honoré 1998, 129 argues that the promoters of the *CTh* had a directly political aim to unify the laws of east and west.

<sup>15</sup> Recent studies exploring the complexities of ‘legal knowledge production’ include Darian-Smith 2013, 97-166; Sarat, Douglas and Umphrey 2007; and Valverde, 2003.

<sup>16</sup> “The first book of the *Theodosian Code* presents what might well be called the juridical foundations of the late Roman state” (Matthews, 2000, 101). Note that if *CTh* I.1 (in the extant text) is read synchronically then *CTh* I.1.1 orders that any edicts or constitutions found henceforth without their date of issuance recorded shall lack authority; *CTh* I.1.2 states that no person can be ignorant or pretend ignorance of the constitutions “which have been carefully weighed with long deliberation by Our Serenity” (trans. Pharr); *CTh* I.1.3 states that all constitutions regulate for the future; and the single sentence *CTh* I.1.4 reads: “A general regulation must be preferred to a special grant of imperial favor”; and *CTh* I.1.5 and 6 relate to the compilation of the *CTh* itself.

promulgated after the Code’s publication”.<sup>17</sup> To a certain extent Roman forensic practice demanded archival thinking. Security of legal tenure and private property, for example, required a stable and ‘verifiable’ legal past. As *CTh* I.1.5 (issued by Theodosius II at Constantinople and dated March 26 429) implies, however, the kind of archival thinking that is evident in the *Codex Theodosianus* was part of a broader, socio-cultural, logic:

Although it would be simpler and more in accordance with law to omit those constitutions which were invalidated by later constitutions, and to set forth only those which must be valid, let us recognize that this code and the previous ones were composed for more diligent men, to whose scholarly efforts it is granted to know those laws also which have been consigned to silence and have passed into desuetude, since they were destined to be valid for the cases of their own time only.<sup>18</sup>

The *Codex Theodosianus* does not lay down the law; instead it provides its elite, specialist readers with the tools – epistemological and material – to produce their own ‘valid’ legal knowledge *as defined by and through the Codex itself*.

On one level, the title-rubrics contained within each book of the *Codex Theodosianus* create a referable structure for those who seek to consult it on particular topics. On another level, the title-rubrics map and colonize the fields within which ‘valid’ late Roman legal knowledge could be produced. Section 2 below: “Reading the *Codex Theodosianus* as a work of imperial ‘knowledge-ordering’” analyses how, exactly, this imperially commissioned and promulgated *codex* ordered and structured late Roman legal knowledge. Having explored the importance of knowledge-ordering in the *Codex Theodosianus*, Section 3 turns to Book XVI in particular, analysing how its specific title-rubrics map out and colonize a legal field that we today would term ‘religious’.

### The *Codex Theodosianus* as a Work of Imperial ‘Knowledge-ordering’

“One important starting point is to underscore the extent to which taxonomic contexts matter.”<sup>19</sup>

The *Codex Theodosianus* is a work of late Roman imperial knowledge-ordering that belongs to a specific sphere of erudition and practice: law. It was by no means the first authoritative collection of Roman law. For example, the structure of books II to V of the *Codex Theodosianus* – the main ‘private law’ books – was based around the *Edictum Perpetuum* (the revision of the Roman Praetor’s *Edict* into a fixed form,

17 *CTh* I.1.6 (Mommson 1905, vol. I.2, 29: lines 18-20).

18 *CTh* I.1.5 (Mommson, 1905, vol. I.2, 28: lines 10-14. Trans. Pharr). Compare Theodosius II, *Novel* I.1pr. For further discussion see Honoré 1998, 142-9 on ‘conflicting laws’.

19 Lehoux 2012, 136.

c. 130 CE, by the jurist Salvius Julianus at the request of the emperor Hadrian), as well as the Classical jurisprudential tradition of commentary *Ad edictum*.<sup>20</sup> Nor was the *Codex Theodosianus* the first collection of imperial constitutions. Justinian’s *Digest* contains sixteen fragments from a work entitled *Libri Constitutionum* by the jurist Papirus Iustus, who seems to have focused mainly on paraphrasing private rescripts (imperial responses to petitioners) from the Antonine era.<sup>21</sup> The two Diocletianic Codes, compiled by the jurists Gregorius and Hermogenian – perhaps with some kind of official authority – also concentrate on imperial rescripts.<sup>22</sup> The *Codex Gregorianus* collected together material from the 130s CE up to the 290s, dividing it into books and titles; whilst the *Codex Hermogenianus* collated rescripts from 293 and 294 and divided them into titles only.<sup>23</sup> There is also archival and jurisprudential evidence for late Roman individuals collecting and (re-)copying sets of imperial constitutions to serve the needs of specific situations and contexts.<sup>24</sup> The *Codex Theodosianus*, however, was the first of its kind: the first systematically-ordered collection of Imperial constitutions to bear the name of an emperor and to be imperially-promulgated as such.

Book 1, title 1 of the *Codex Theodosianus* includes two excerpts directly relevant to the compilation of the *Code* itself. *CTh* I.1.5 is an excerpt from a text dated 26 March 429, originally addressed to the senate of Constantinople and probably drafted by the then *quaestor sacri palatii*, Antiochus (Chuzon). *CTh* I.1.6, dated 20 December 435, has no addressee recorded and is possibly an extract from a memorandum addressed to a newly reconstituted editorial committee, about to embark on the next stage of editing raw material for inclusion in the *Code*.<sup>25</sup> *CTh* I.1.5 begins by ordering that a collection of ‘general’ imperial constitutions, from the time of Constantine to the present, shall be compiled “after the pattern of the Gregorian and Hermogenian Codes” (*Ad similitudinem Gregoriani atque*

20 The reconstruction of the *Edictum perpetuum* by Riccobono 1941, 335-89 is based on a reconstruction from juristic sources by Lenel 1927. The *Edictum perpetuum* was divided into discrete *tituli* according to subject; juristic commentary on the edict followed this structure. Corcoran 2013, 5 notes that a wider use of *tituli* in jurisprudential literature dates to the later third and fourth centuries AD and is probably related to a shift in technology from roll to codex.

21 Volterra 1968.

22 On the two Diocletianic Codes and their authority see Corcoran 2013. Matthews 2001, 15-6 notes that the authors of the Visigothic *interpretationes* to Alaric’s *Breviarium* understood Gregorius and Hermogenian as jurists, to be classified alongside Gaius, Papinian and Paul (rather than as bureaucratic officials).

23 Neither are extant. For further discussion see Corcoran 2013.

24 Copies collected in private archives: for example, P. Vindob. G 25945 and from a later period, the *Sirmondian Constitutions*. Copies for academic and / or practical purposes: The *Fragmenta Vaticana* has imperial constitutions on specific topics arranged under titles, with interleaved quotations from Classical jurists (see further de Filippi 1998), as does the late Roman text known as the *Consultatio veteris cuiusdam iurisconsulti*.

25 Matthews 2000, 64.



*Hermogeniani codicis...*).<sup>26</sup> *CTh* I.1.5 then goes on to specify how the new projected Codex must be structured and arranged:

First, the titles [*tituli*], which are the definite designations of the matters therein shall be so divided that, when the various headings have been expressed, if one constitution should pertain to several titles, the materials shall be assembled wherever each is fitting. Then, if any diversity should cause anything to be stated in two ways, it shall be tested by the order of the readings, and not only shall the year of the consulship be considered, and the time of the reign be investigated, but also the arrangement of the work itself shall show that the laws which are later are more valid.<sup>27</sup>

The (excerpted) constitutions were to be ordered chronologically under thematic titles that accurately designated their content. If a single constitution contained material that was relevant to more than one title, then it was to be divided up and each discrete excerpt was to be copied in its correct place, under its corresponding title. Note that in order to understand the material collected under a specific title, users of the *Code* had to read that material in a linear way: the (excerpted) constitutions were to be interpreted in relation to each other, in a chronological sequence within each title.<sup>28</sup> The arrangement of the *Codex Theodosianus* into books and thematic titles was not simply for the convenience of the code-makers: each title-heading within the *Codex* was intended to act as an explanatory lemmata for its contents. The title-rubrics effectively provided the authoritative context in which the excerpted constitutions were to be understood.

The importance that Theodosius II and his advisors attributed to this architectonic structure – books, subdivided into thematic titles, followed by (chronologically-ordered) discrete excerpts – can be seen in the 429 CE plans for a further *Codex*, to follow on from Theodosius II's first compilation:

Moreover, from these three codes [the Gregorianus, the Hermogenianus and the first 'Theodosianus'] and from the treatises and responses of the jurists which are attached to each of the titles, through the services of the same men who shall arrange the third code [i.e., the first 'Theodosianus'], there shall be produced another code of Ours. This code shall permit no error, no ambiguities, it shall be called by Our name and shall show what must be followed and what must be avoided by all.

The desire to produce a second *Codex*, a *Codex* that would “exclude every contradiction of law” and “undertake the guidance of life”, was not realized by either the 429 editorial committee or the reconstituted 435 committee.<sup>29</sup> The important point to note here, however, is that the projected juristic material – the ‘treatises

and responses’ of the experts – was to be selected and arranged according to the titles within the code(s).<sup>30</sup> Whether we should think in terms of contemporary legal experts (perhaps from the recently re-ordered Constantinopolitan law school) producing an authoritative running commentary, or of the Theodosian editorial committee itself selecting and copying relevant sections from (Classical?) juristic texts, the jurisprudential material was supposed to be structured according to an order of knowledge already established by Theodosius II's *Codex*.

The functional importance of the title-rubrics, moreover, is demonstrated by a change in citation practices after the publication of the 438 CE Code. Imperial constitutions were cited subsequently using their title headings within the *Codex*: for example, when Theodosius II's 429 constitution announcing the *Codex* project was read out to the Roman Senate on 25 December 438 it was identified as *ex codice Theodosiano, libro primo, sub titulo 'de constitutionibus principum et edictis'*.<sup>31</sup>

The title-rubrics of the *Codex Theodosianus* were thus integral to both its compilation and use. How did the Theodosian commissioners decide on the wording and ordering of these title-rubrics within the 438 *Codex*?<sup>32</sup> As we have seen, Theodosius' (first) *Codex* was to be modelled on the Gregorian and Hermogenian Codes. Neither of these Diocletianic Codes survive, but their structure has been partially reconstructed from other sources:

The Gregorian Code comprised at least thirteen books, although most modern scholars tend to give it fifteen. This may explain why the Theodosian Code extended also to fifteen books, if we disregard the unprecedented ecclesiastical Book XVI; unless, that is, the total represents the Gregorianus and Hermogenianus together as a sixteen book opus. The greater size and scale of the Gregorian Code meant that it could have been more lavish in its title divisions than the Hermogenianus. For instance, where Hermogenian used a joint title *de pactis et transactionibus*, the Gregorianus seems, like the Justinian Code, to have used two adjacent titles *de pactis* and *de transactionibus*. Thus the Gregorianus is the more likely model for the imperial codes.<sup>33</sup>

Each of the (probably) fifteen books of the Gregorianus were sub-divided according to thematic headings and organised chronologically; that order is likely to have followed the *edictum perpetuum* up to book 12, with non-edictal material

<sup>26</sup> See below for further discussion.

<sup>27</sup> Mommsen 1905, vol I.2, 28: lines 4-8 (trans Pharr).

<sup>28</sup> These provisions are repeated again in *CTh* I.1.6.

<sup>29</sup> Quotations from *CTh* I.1.5. For a broad comparison, see König, 2009 75 on the ‘totalising ambition’ of knowledge-ordering in the Hellenistic period.

<sup>30</sup> The *Breviarium of Alaric* (506 CE) follows the first model, providing Visigothic *interpretationes* (clarificatory notes) for each discrete text within the Gregorian, Hermogenian and Theodosian Codes (in addition to *interpretationes* on post-438 *Novellae* and various jurisprudential treatises). Justinian's *Digest*, on the other hand, is closer to the second model. On the recent reorganisation of the Constantinopolitan law school and the possible involvement of individuals from that law school in compiling the *CTh*, see Matthews 2000, 83.

<sup>31</sup> *Gesta Senatus Romanus*, 4. The Visigothic *interpretatio* to the *Breviary of Alaric* also I.4.1 cites *CTh* I.1.5 by its rubric.

<sup>32</sup> On the structure of the titles see Mommsen 1905, vol. I.1: xiii-xviii; Harries, 1998 (focused mainly on books I to VI of the *CTh*); Matthews 2000, 78-83 and 289-92; and Corcoran 2013. For more general discussion on the structure of law books, see Wibier 2014.

<sup>33</sup> Corcoran 2013, 10.

added into the final books.<sup>34</sup> For the most part, the 438 *Codex Theodosianus* also structures its private law material (mainly contained in books II through to IV) according to the *tituli* of the *edictum perpetuum*, with book V also bearing some relation to the praetorian structure.<sup>35</sup> As Harries states, books II through to V of the 438 CE Code are “framed by two obviously non-Edictal books”: Book I on law and high-ranking officials and Book VI on official questions of precedence affecting the senatorial order and the imperial administration.<sup>36</sup> Apart from some private law material included in Book VIII, the rest of the 438 CE *Codex* is concerned with administrative and public law. The *Codex Theodosianus* thus follows a broad, pre-existing, juristic principle that material outside the edictal framework is to be added to later books or titles.<sup>37</sup> The titles in Book IX relating to criminal law and those in Books X and XI relating to the imperial *fiscus* and taxation may also be derived from corresponding titles in the Diocletianic era codes containing non-edictal material. “However, most scholars tend to think that the Diocletianic codes were a poor model for arranging the extensive public law material of the Theodosian Code, and that in those areas Theodosius’s compilers may have needed to exercise greater innovation”.<sup>38</sup> In any case, neither the Gregorian nor Hermogenian Code could offer (direct) precedents for the thematic *tituli* that divide up Book XVI of the 438 CE *Codex Theodosianus*.<sup>39</sup>

In sum, the titles within each of the sixteen books of the *Theodosian Code* create a taxonomic structure that maps out ‘the’ late Roman legal field, establishing an authoritative interpretative structure for legal scholars and practitioners alike.<sup>40</sup> If we turn now to Book XVI of the *Codex Theodosianus* it should be clear that this book offers more than a systematic collection of imperial constitutions relevant to what we would term religion. Book XVI effectively re-archives the religious past according to a new Imperial order. As we shall see via a brief analysis of Theodosius II’s *Novel* 3 (dated January 31 438 and as such the first extant ‘new constitution’ to be published after the Code’s completion), the title-headings of Book XVI structure and organize the religious past into new, authoritative, categories and taxonomic classifications.

34 Sperandio 2005: 389–95 attempts to reconstruct a list of titles for the *Codex Gregorianus* (see also Sperandio 2007). For the possible arrangement of *tituli* within the single book of the *Codex Hermogenianus*, see Cendrelli 1965.

35 Harries 1998, esp. 71–8.

36 Harries 1998, 75.

37 See Corcoran 2013, 9 for examples where non-praetorian private law (“Civil law or that based upon later *leges* or *senatus consulta*”) was included in the final books or titles of Classical juristic works.

38 Corcoran 2013, 10.

39 Corcoran 2013, 12 asks whether either Diocletianic Code might have contained anti-Christian texts “as we know was the case for Ulpian’s *De officio proconsulis* Book VII”. Diocletian’s rescript on the Manichees (either 297 or 302) was copied into the *Gregorianus*, although perhaps at a later date.

40 For a specific example see Humfress 2011.

## ***Codex Theodosianus* Book XVI and ‘Knowledge of Matters Both Human and Divine’**

Of course lawyers recognized that legal arguments had to do with things in the world, but the ‘real’ or ‘material’ existence of these things was eclipsed by the existence that they came to have within the discursive or rhetorical frame of legal debate...<sup>41</sup>

The final book of the *Codex Theodosianus* has rightly been described as the “unprecedented ecclesiastical book XVI”.<sup>42</sup> Yet the idea that “knowledge of the law entails knowledge of matters both human and divine...” was by no means new.<sup>43</sup> Classical Roman jurists categorized religious law – law concerned with maintaining correct relations between the *res publica* and the gods – under the category of Roman public law.<sup>44</sup> During the early Principate public law was connected with the maintenance of the *res publica* for the sake of ‘public interest’ (*utilitas publica*); hence the third-century CE jurist Marcian advises that it is the duty of provincial governors to track down and punish those who commit sacrilege against the gods, as well as thieves, kidnappers and hijackers.<sup>45</sup> According to the emperor Decius (249 CE) maintaining correct relations between the human and the divine necessitated an empire-wide supplicatio of the gods, a legal requirement that effectively marked out Christians and Jews (in different ways) and formed a further precedent for subsequent prosecutions concerning religious beliefs and practices.<sup>46</sup>

The scholarly efforts of most Roman Classical jurists, however, were focused upon private law: the branch of law that governed relations between citizens (and subjects). Determining ‘correct’ legal relationships between men might also, of course, demand taking into account what was due to the gods. Questions concerning a god’s ownership of property could arise in lawsuits concerning land, boundaries or taxation: for example, during the reign of Domitian a group of Egyptian villagers apparently defended themselves against a charge of non-payment of taxes with the plea that they were tax-exempt, because their village

41 Pottage, 2014, 151.

42 Corcoran 2013, 10 (quoted above). See also Guinot and Richard 2008, Crifo 1999 and Aubert and Blanchard 2009. On the manuscript sources and tradition for CTh Book XVI see Mommsen 1905, Prolegomena (volume I.1), xc-xcii and Magnou-Nortier 2002.

43 For a brief overview in relation to the archaic and Classical periods of Roman law see Riggsby 2010, 205–213; also Watson 1992, Ando and Rüpke (ed.) 2006 and for the later Empire, Lizzi Testa 2009. The quotation is from Justinian *Digest* 1.1.10.2 (Ulpian, *Rules book* 1), as in footnote 1 above.

44 Stated by Ulpian *Institutes* book I, as excerpted in Justinian’s *Digest* at 1.1.1.2.

45 Justinian *Digest* 48.13.4.2 (Marcian, *Institutes* Book 14), see also *Digest* 1.18.13pr (Ulpian, *On the Office of the Proconsul* Book 7). Book 7 of Ulpian’s *On the Office of the Proconsul* contained ‘anti-Christian’ material (see further Marotta 2004, 80–87 and Nogrady 2006, 40–75).

46 Further discussion in Selinger, 2004; Luijendijk, 2008: 157–174; Kahlos 2009; and Barnes 2010. Note that Galerius’ edict (posted at Nicomedia on 30th April 311) granted freedom of worship to Christians ‘provided that they do nothing to disturb good order’ and ‘pray to their god for our safety and for that of the *res publica* and themselves, so that from every side the *res publica* may be kept unharmed...’ (trans. Creed).

was dedicated to the god.<sup>47</sup> ‘Sacred’ property was no longer available for human ownership or use. Regulating legal relations between Roman citizens might also demand taking into account what was owed to the gods in other contexts. For example, according to a third-century CE commentary on the *Edictum perpetuum*, individuals appointed to priesthoods could be exempted from acting as arbitrators in civil suits, in recognition – stated the jurist Paul – of both the honour due to them and to “[...] the majesty of the god for whose rites the priests ought to be free”.<sup>48</sup> In a broader philosophical context, some Roman jurists – alongside other (elite) early Imperial writers – drew attention to the close connection between Roman law and religion. Ulpian, for example, states that knowledge of the law is something sacred.<sup>49</sup> According to the third-century CE jurist Marcian, law itself is an invention and gift of the gods.<sup>50</sup>

Various precedents for the material collected together in the final book of the *Codex Theodosianus* thus existed within earlier Roman private and public law. If, however, the 429 CE plan for a second, complete, *Codex Theodosianus* – bringing the Gregorian, Hermogenian and Theodosian Codes together with juristic material – had been achieved, it is extremely difficult to think of which pre-existing juristic treatises and opinions could have been attached, according to subject matter, to the titles of Book XVI. As Jill Harries suggests, the fact that Book XVI is the final book of the Code perhaps implies a certain ‘outlier’ status: “While this is not to argue that Christian legislation was merely an untidy afterthought, its late placement would appear to suggest that the legal advisers of the ‘*pius princeps*’ still saw laws on Christianity as, in legal terms, outside the categories within which, as lawyers and administrators, they were accustomed to operate”.<sup>51</sup> Neither the *Edictum perpetuum* nor any previous collections of imperial constitutions, including the Gregorianus and Hermogenianus, offered specific precedents for how to structure and order the material in Book XVI. Theodosius II’s editorial panel(s) – comprised of bureaucratic and legal officials – had to come up with the headings for the titles within Book XVI from scratch. In other words, they had to subsume a myriad of different religious practices within a structure capable of rationalisation. It is this level of formal ‘knowledge-ordering’ – an intellectual scaffolding specifically constructed, as previously noted, with diligent and scholarly men in mind – that I am interested in here.<sup>52</sup>

47 P. *Vindob. Worp.* 1 as noted by Crook 1995, 72.

48 *Digest* 4.8.32.4 (Paul, ad. ed., 13).

49 Justinian, *Digest* 50.13.1.5 (Ulpian 8 *omn. trib.*). Compare Aulus Gellius *Attic Nights* 14.4.3 defining the judge as ‘a priest of justice’ (a phrase borrowed from the philosopher Chrysippus).

50 Justinian *Digest* 1.3.2 (Marcian, 1 *Institutes*), quoting the Attic orator Demosthenes.

51 Harries 1998, 78. In contrast, Justinian’s *Codex* places its book of religious and ecclesiastical material at the beginning of the text.

52 On the intended audience of the *Theodosian Code* see footnote 18 above.

Book XVI is ordered into eleven titles: Title one, *de fide catholica* (on the ‘catholic’ / ‘universal’ faith); title two, *de episcopis, ecclesiis, et clericis* (concerning bishops, churches and clerics); title three, *de monachis* (concerning monks); title four, *de his qui super religione contendunt* (concerning those who argue about religion); title five, *de haereticis* (on heretics); title six, *ne sanctum baptismum iteretur* (holy baptism not to be repeated); title seven, *de apostatis* (concerning apostates); title eight, *de Judaeis, Caelicolis, et Samaritanis* (concerning Jews, Caelicolists and Samaritans); title nine, *ne Christianum mancipium Judaeus habeat* (no Jew shall have a Christian as a slave); title ten, *de paganis, sacrificiis, et templis* (concerning pagans, sacrifices and temples); and title eleven, *de religione* (concerning religion). Where did the topics for these eleven titles come from?

This is not simply a question of what raw material was available to Theodosius II’s editorial committee. The second volume of Rougé and Delmaire’s *Les Lois Religieuses des Empereurs Romains de Constantin à Théodose II (Sources Chrétiennes 531)* contains three hundred and seventy one pages of text, with translation and commentary, from Books I to XV of the *Codex Theodosianus*.<sup>53</sup> In some cases the rationale for placing a discrete text under a specific book and title is clear: for example, extracts from imperial constitutions relating to *maleficium* (harmful magic), divination and tomb violation were placed under titles in Book IX of the *Theodosian Code*, alongside other public ‘crimes’ such as homicide and adultery (as defined by earlier statute legislation).<sup>54</sup> Similarly, the exemption of Christian clerics from certain types of compulsory public burdens is listed under Book XI, title 16: *de extraordinariis sive sordidis muneribus* (extraordinary and menial compulsory burdens), alongside the other individuals and groups who shared similar exemptions.<sup>55</sup> We also, however, find two of the same texts from Book XI repeated under Book XVI, title 2: *de episcopis, ecclesiis, et clericis* (concerning bishops, churches and clerics).<sup>56</sup> The Theodosian editorial committee thus deliberately selected the material that went into Book XVI, at the same time as placing a significant body of other ‘religious’ material elsewhere in the *Code*.<sup>57</sup> What, then, can the title-headings of Book XVI itself tell us about the (second) Theodosian editorial committee’s structures of thought?

If we survey the range and ordering of title-headings within Book XVI we can see how the time-honoured imperial duty of ensuring the *pax Romana* is now framed as a concern to maintain ‘correct’ relations exclusively with the Supreme

53 Rougé and Delmaire, 2009, 28-399 (based on Mommsen 1905). See also the general table of religious laws between 313-438 CE in Rougé and Delmaire 2005, 37-52.

54 For further discussion with specific reference to magic and heresy see Minale, 2013.

55 *CTh* XI.16.15 and *CTh* XI.16.21-22.

56 *CTh* XI.16.21-22 = *CTh* XVI.2.30.

57 As Rougé and Delmaire 2005, 35-6 explain, “Il est impossible de faire l’histoire de la législation religieuse des empereurs à partir du seul Code Théodosien et de ses annexes, les Constitutions sirmondiennes...” not least as a lot of ‘religious legislation’ survives outside the *CTh*.



God of the Christians. Leaving aside titles one and eleven for the moment, the title-headings of sections XVI.2 and XVI.3 focus on the (religious) experts and specialists responsible for maintaining good relations with the Christian God: bishops, clerics, and monks. Note that throughout the constitutions excerpted under XVI.2 there is a careful weighing of interests: bishops and clerics are essential to the 'state' and are thus to be supported by imperial patronage, including the endowment of property, privileges and exemptions, but not to the detriment of the empire as a whole.<sup>58</sup> The specific religious power and expertise of [Christian] monks is acknowledged by their inclusion as a category at XVI.3. But as the two constitutions excerpted under this title demonstrate, monks also posed challenges, to public order.<sup>59</sup> Title XVI.4 "concerning those who contend about religion" contains six excerpted constitutions, each with a highly specific original context – nonetheless the logic underlying the positioning of this title-heading within Book XVI seems clear. Those who contend about religion threaten the safety and prosperity of the empire, as do heretics (XVI.5), apostates (XVI.7), Jews, Caelicolists and Samaritans (XVI.8) and pagans (XVI.10) – albeit in different ways and to differing extents. Title XVI.6, in comparison, deals with those who threaten human-divine relations by the incorrect performance of sacred rituals: Christian baptism is not to be repeated. Maintaining 'correct' relations with the Christian God also meant adjusting (some) human hierarchies, hence the rubric of XVI.9: "Jews cannot have Christians slaves". As we shall see further below, the title-headings of Book XVI map out a specific and precise terrain.

The two title-headings that frame Book XVI are *de fide catholica* (XVI.1) and *de religione* (XVI.11). Title one contains four excerpted imperial constitutions, each offering a definition of the catholic faith: it is exclusive, hence there are heavy penalties if 'men of the Christian religion' are appointed as custodians of temples (XVI.1.1); it is defined by apostolic discipline and evangelical doctrine, as established by specific church councils (XVI.2.1, section 1; XVI.1.3; and XVI.1.4); it necessitates being in communion with and in the fellowship of 'acceptable priests' (XVI.1.2, XVI.1.3 and XVI.1.4); and it determines property rights over churches, as well as the right of voluntary assembly (XVI.1.2 preamble, XVI.1.3 and XVI.1.4). The three excerpted constitutions in title eleven showcase imperial authority in relation to religious matters. For example, in its original context the final constitution included in Book XVI (*CTh* XVI.11.3, issued by the emperor Honorius at Ravenna on October 14, 410) was part of a highly specific measure targeting Donatists in North Africa; but the careful placing of this extract is meant to refer the reader back to the entire contents of Book XVI: "We abolish the new superstition and We command that those regulations in regard to the Catholic law shall be preserved unimpaired and

<sup>58</sup> See for example *CTh* XVI.2.3. Compare Valentinian III *Novel* 3pr (to Maximus Praetorian Prefect, 439 CE) which states that there are (now) too many Christian clerics for the public good.

<sup>59</sup> The first constitution excerpted under this title refers to monks as a 'profession' and orders that they should live in desert places i.e., not in cities (*CTh* XVI.3.1). The second excerpted constitution abolishes the first (*CTh* XVI.3.2).

inviolable, as they were formerly ordained by antiquity or established by the religious authority of Our Fathers or confirmed by Our Serenity" (trans. Pharr). Book XVI thus ends by underscoring its own authority and message.

On the level of knowledge-ordering, the imperial and archival thinking evident in Book XVI of the *Codex Theodosianus* has two main effects. Firstly, it achieves 'unity through diversity'. The constitutions excerpted under the specific titles are by no means univocal; the most striking example of this belongs to *CTh* XVI.5 and concerns whether Eunomians could make wills and take by will:

Six laws deal with this question. A western text of 389 [*CTh* XVI.5.17] denies them testamentary capacity. An eastern law of 394 allows it [*CTh* XVI.5.23], but is repealed on the death of Theodosius I [*CTh* XVI.5.25], only to be restored later in the same year [*CTh* XVI.5.27], the restoration being confirmed in 399 [*CTh* XVI.5.36] and removed again in 410 [*CTh* XVI.5.49].<sup>60</sup>

The archival structure of the *Codex* – the fact that it was produced for 'more diligent men' as *CTh* I.1.5 puts it – permits this kind of diversity, by order of Theodosius II. There is thus a unity to Book XVI that is centred on Theodosius II himself. As the preamble to Theodosius II's first (extant) constitution to be promulgated after the *Codex Theodosianus* states:

Among the other anxieties which Our love for the state has imposed upon Us for Our ever watchful consideration, We perceive that an especial responsibility of our Imperial Majesty is the pursuit of the true religion. If we shall be able to hold fast to the worship of this true religion, We shall open the way to prosperity in human undertakings. This We have learned by the experience of Our long life, and by the decision of our pious mind We decree that the ceremonies of sanctity shall be established by a law of perpetual duration, even to posterity.<sup>61</sup>

The eleven titles of Book XVI effectively map out the parameters of Theodosius II's 'especial responsibility'. The second effect of Book XVI's imperial and archival thinking is that its title-headings function as imperial endorsements of new taxonomies: 'pagans' (linked with sacrifices and temples), 'Jews, Caelicolists and Samaritans', 'heretics'. Again, we find these new legal taxonomies being quickly reapplied in Theodosius II, *Novel* 3.1:

For who is so demented, so damned by the enormity of strange savagery, that, when he sees the heavens with incredible swiftness define the measures of time within their spaces under the sway of the divine guidance, when he sees the movements of the stars which control the benefits of life, the earth richly endowed with the harvests, the waters of the sea, and the vastness of this immense achievement confined within the boundaries of the natural world, he does not seek the author of so great a mystery, of

<sup>60</sup> Honoré, 144

<sup>61</sup> Theodosius II, *Novel* 3.1, preamble (dated Jan 31, 438, issued at Constantinople and addressed to the Praetorian Prefect Florentius).

so mighty a handiwork? We learn that the Jews, with blinded senses, the Samaritans, the pagans, and the other breeds of heretical monsters dare to do this...<sup>62</sup>

The ordering of legal knowledge in Book XVI of the *Codex Theodosianus* – in particular the wording, subjects and structuring of its eleven titles – is specific to the age of Theodosius II.

## Conclusion

If we want to understand the knowledge-ordering in Book XVI of the *Codex Theodosianus* we need to understand religion and politics in the era of Theodosius II.<sup>63</sup> The *tituli* and excerpted material in Book XVI were not, however intended to draw a map as similar as possible to its territory. As Alain Pottage states in the quotation given at the beginning of section 3 above: “Of course lawyers recognized that legal arguments had to do with things in the world, but the ‘real’ or ‘material’ existence of these things was eclipsed by the existence that they came to have within the discursive or rhetorical frame of legal debate”.<sup>64</sup> We cannot assume that the categories found in Book XVI are a ‘natural’ or ‘accurate’ reflection of realities on the ground; instead, they offer us an imperial – and imperialist – ordering of late Roman law and religion.

Legal knowledge, however, is not simply constituted by emperors and their legal *codices*: “Legal knowledge refers to the ensemble of forms of knowing, theorizing, judging, analyzing and reflecting that constitute the practices of legal actors”.<sup>65</sup> We thus need to ask how litigants, legal and bureaucratic officials, Christian ecclesiastics and other individuals and groups made use of the archival and imperial thinking that underpins Codex Theodosianus Book XVI, in specific and concrete contexts.

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<sup>62</sup> Theodosius II, *Novel* 3.1, section 1.

<sup>63</sup> See for example Honoré 112-8 and 125 on Antiochus (Chuzon)'s involvement with ecclesiastical politics, including the Council of Ephesus and its aftermath (431-435 CE). Antiochus was promoted to the role of president of the reconstituted *Codex Theodosianus*' editorial committee in 435 CE.

<sup>64</sup> Pottage 2014, 151.

<sup>65</sup> Riles 2007, 885.

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